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No. 75-523

In the Supreme Court of the United States

OCTOBER TERM, 1975

SAMUEL KAPLAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that a co-conspirator's hearsay statement should not have been admitted into evidence.

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of distribution of heroin, in violation of 21 U.S.C. 841(a)(1), and was sentenced to eight years' imprisonment, to be followed by ten years' special parole. The court of appeals affirmed without opinion (Pet. App. 1a-2a).

The evidence showed that Frank Lange sold undercover federal narcotics agent Nicholas Alleva an ounce of heroin (Tr. 17-18).[1] Alleva testified that in a telephone conversation on January 5, 1972, he complained of the poor quality of the narcotics and asked about the quality of his next purchase. Lange stated that the quality would be "much better" and told Alleva to come to his house the following day when "his connection" would be present (Tr. 19-20; Pet. 6-7).

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[1]Lange was originally named as a co-defendant, but he died before trial.

On January 6, 1972, Alleva arrived at Lange's residence as arranged. Lange greeted Alleva on the stairway and invited the agent to come upstairs to his bedroom. On entering the bedroom, Alleva observed petitioner reclining on a mattress (Tr. 20-23). No introductions were made.

Lange removed a plastic bag containing 25.6 grams of heroin from a night table drawer (Tr. 24, 34). Alleva looked at both petitioner and Lange and stated, "either one of you or both of you will have to go down with me to get the money" (Tr. 25). Petitioner asked why this procedure was being followed (Tr. 26). Alleva responded, "You guys beat me once, and you are not going to do it again," referring to his previous purchase of low-quality heroin (Tr. 26, 30). Petitioner then motioned to Lange, directing him to accompany the agent. Before Alleva left the room, petitioner reassured him of the quality of the heroin (Tr. 28). Shortly thereafter, both petitioner and Lange were arrested.

Petitioner objected *in limine* and at trial to the admission of Alleva's testimony concerning Lange's statement in the telephone conversation that his "connection" would be at the house. The court admitted the testimony under the co-conspirator exception to the hearsay rule (Tr. 16A). The court instructed the jury, however, that they could not consider the hearsay statements against petitioner unless his own acts and statements had shown him to be a member of the conspiracy (Tr. 214-215).

Petitioner contends (Pet. 9) that Lange's statements in the telephone conversation with Alleva should not have been admitted because there was insufficient proof that petitioner and Lange were conspiring with one another on

the day the statements were made.[2] But the record fully supports the implicit finding of both courts below that Lange's telephone conversation was made in the course of and in furtherance of a conspiracy with petitioner. The evidence showed that on the day following the telephone conversation, Lange gave the agent a bag of heroin in full view of petitioner and then discussed the transaction without any apparent reticence. Petitioner's reaction to Alleva's request to descend for payment, his instruction to Lange to comply with this request, his response to the agent's comments and his assurances concerning the quality of the drugs demonstrate that he was involved in a pre-existing drug distribution relationship with Lange.

The evidence furnished an ample basis for inferring that petitioner knew about and participated in the heroin transaction. Accordingly, the admission of Lange's hearsay statements against petitioner was proper. See *Anderson* v. *United States*, 417 U.S. 211, 218-219; *Lutwack* v. *United States*, 344 U.S. 604; *United States* v. *Cirillo*, 499 F. 2d 872 (C.A. 2), certiorari denied, 419 U.S. 1056; *United States* v. *Santos*, 385 F. 2d 43 (C.A. 7), certiorari denied, 390 U.S. 954; *United States* v. *Spanos*, 462 F. 2d 1012 (C.A. 9).

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[2]At petitioner's first trial, this testimony was admitted under the state-of-mind exception to the hearsay rule. The court of appeals reversed the resulting conviction, *United States* v. *Kaplan*, 510 F. 2d 606 (C.A. 2), ruling that petitioner was entitled to a new trial "at which this hearsay will be excluded." *Id.* at 610. However, the opinion contained a lengthy discussion of the possible application of the co-conspirator exception and concluded that the testimony could possibly be admissible on that basis. It also stated that had the district court judge made the findings necessary to support the admission of the testimony on this ground, those findings "would have been highly likely to stand on appeal." *Id.* at 612. Petitioner's contention (Pet. 8-9) that the first decision absolutely precluded introduction of this testimony on any basis at the second trial is therefore erroneous.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

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